1986

Darwin Dirks and Jacqueline Dirks v. Paul S. Cornwell, Catherine L. Cornwell, Wilford W. Goodwill, Dorothy P. Goodwill, Clearfield State Bank, Small Business Administration, Western Bonded Collections, Stewart Title Company of Ogden, and Ogden First Federal Savings and Loan Association and All other persons unkown claiming any right, title, estate, lien, or interest in the real property described in Plaintiff's complaint adverse to Plaintiff's ownership or any cloud upon Plaintiff's title thereto : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

* *

DARWIN DIRKS and JACQUELYN DIRKS, Plaintiffs-Respondents, vs. PAUL S. CORNWELL, CATHERINE L. CORNWELL, WILFORD W. GOODWILL, DOROTHY P. GOODWILL, CLEARFIELD STATE BANK, SMALL BUSINESS ADMINISTRATION, WESTERN BONDED COLLECTIONS, STEWART TITLE COMPANY OF OGDEN, and OGDEN FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and All other persons unknown claiming any right, title, estate, lien, or interest in the real property described in Plaintiff's complaint adverse to Plaintiff's ownership or any cloud upon Plaintiff's title thereto, Defendants-Appellants.	860374-CA CASE NO. ~~20169~~

BRIEF OF PLAINTIFFS-RESPONDENTS DARWIN DIRKS AND JACQUELYN DIRKS IN ANSWER TO DEFENDANTS-APPELLANTS' APPEAL

Second Judicial District Court	Honorable Ronald O. Hyde District Judge
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IN THE SUPREME COURT OF THE STATE OF UTAH

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DARWIN DIRKS and JACQUELYN DIRKS, Plaintiffs-Respondents, vs. PAUL S. CORNWELL, CATHERINE L. CORNWELL, WILFORD W. GOODWILL, DOROTHY P. GOODWILL, CLEARFIELD STATE BANK, SMALL BUSINESS ADMINISTRATION, WESTERN BONDED COLLECTIONS, STEWART TITLE COMPANY OF OGDEN, and OGDEN FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and All other persons unknown claiming any right, title, estate, lien, or interest in the real property described in Plaintiff's complaint adverse to Plaintiff's ownership or any cloud upon Plaintiff's title thereto, Defendants-Appellants.	CASE NO. 20169

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

There are two main issues presented for review. First, shall this Court overrule its previous holdings in Jeffs v. Citizens Finance Company, 319 P.2d 858 (Utah 1958) and Wiscombe v. Lockhart Co., 608 P.2d 236 (Utah 1980) where it held that in cases such

as the one at bar, it was up to the one who took an interest in a real estate contract (the Defendants Goodwills, here) as pledge for a loan to seek out and determine the status of his assignor's rights and obligations? Second, does the mere existence of statutes which regulate Quiet Title Actions and Mortgage Foreclosures and the provision by the state of a neutral court system to settle private disputes involving land constitute state action for Fourteenth Amendment purposes?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The Due Process Clause in Section 1 of the Fourteenth Amendment to the United States Constitution states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;. . . ."

Rule 56(c) of the Utah Rules of Civil Procedures states in appropriate part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This proceeding is a Quiet Title Action wherein all defendants have been eliminated except the Defendants-appellants Wilford W. Goodwill and Dorothy P. Goodwill. Record at 120-122. Judge Ronald O. Hyde of the Second Judicial District Court granted

Plaintiffs-Respondents Darwin Dirks and Jacquelyn Dirks' Motion For Summary Judgment against the Goodwills. Record at 103-104.

The following facts are relevant to the issues presented for review:

On June 10, 1977, Alma S. Butler and his wife, Wanda R. Butler, purchased a piece of real property in Roy, Utah. Approximately a year later, on May 15, 1978, the Butlers sold that property to Paul S. Cornwell and Catherine L. Cornwell on a Uniform Real Estate Contract. The Cornwells recorded a Buyer's Notice of Contract on May 16, 1978. Record at 59.

The Cornwells failed to make their payments as required by the contract and on February 17, 1981, the Butlers notified the Cornwells that the Cornwells were in default on their Uniform Real Estate Contract and on March 4, 1981, the Butlers sent a Notice of Default and Cancellation of Contract to the Cornwells. This Notice was recorded on March 12, 1981. Record at 59.

On March 3, 1980, the Cornwells executed a trust deed on this property in favor of Stewart Title Company of Ogden as trustee and Wilford W. Goodwill and Dorothy P. Goodwill as beneficiaries. This trust deed was for the purpose of securing payment of a promissory note in the sum of $38,000.00. It was recorded on April 3, 1980. Record at 60, 89.

The Butlers were unaware when they sent the Notice of Default and Cancellation of Contract that the Cornwells had executed the trust deed. The Butlers did not become aware of

the existence of this Trust Deed until approximately March 20, 1981. Record at 60.

On March 23, 1981, the Butlers conveyed the property to Darwin Dirks and Jacquelyn Dirks, the plaintiffs in the Quiet Title Action. Record at 60.

It must be noted that Plaintiffs disagree with some of the statements contained in the Defendants' Statement of Facts. First, Goodwills assert several times that a foreclosure proceeding was involved at some point in this action. This is not true. The Butlers repossessed the property in question under the terms of a Uniform Real Estate Contract, not in a foreclosure proceeding. Record at 59, 62, 64. Second, Defendants included some statements as facts when they are clearly not facts but arguments, e.g., that Goodwills had a right to notice and a hearing before Butlers repossessed the property. Defendants' brief at page 4.

Finally, Defendants assert in their Statement of Facts at page 3 of their brief that they (the Goodwills) had a security interest in the property in question of $38,000. This is not true. While it is a fact that Goodwills loaned their assignors, Cornwells, $38,000, Cornwells had only about $9,000 equity in the Uniform Real Estate Contract which they signed with the Butlers. Since the assignee can take no more interest than his assignor had, Goodwills had no more than $9,000 security interest in the property.

An examination of the Uniform Real Estate Contract executed by the Butlers and the Cornwells reveals that the purchase price paid by the Cornwells for the property was $71,000 with $8,000 being paid down and the $63,000 balance plus 9-1/4% interest to be paid at the rate of $506.92 each month, beginning July 1, 1978. Record at 61. These figures reveal that less than $25.00 per month of the $506.92 payment was applied to the principal. The Cornwells paid on this contract from July 1, 1978 until March 3, 1980, a total of 21 payments, before using this contract to secure their loan from the Goodwills. Record at 60, 61, 89. Therefore, on March 3, 1980, when the Cornwells executed their trust deed with the Goodwills, the Cornwells' equity in the Uniform Real Estate Contract was less than $9,000. Even if Cornwells had paid the $5,000 lump sum payment which the contract required to be paid on November 15, 1979 (which they did not), their equity would have been less than $14,000. This is a far cry from the $38,000 which Goodwills now claim as their lost security interest.

SUMMARY OF ARGUMENT

There is compelling precedent in this jurisdiction to affirm the lower court's order granting plaintiffs' motion for Summary Judgment. The 1958 case of Jeffs v. Citizens Finance Company, 319 P.2d 858 (Utah 1958), and the 1980 case of Wiscombe v. Lockhart Co., 608 P.2d 236 (Utah 1980), involved fact situations almost identical to the one at bar. In both cases this Court held that it was up to the purchaser's assignee (the Goodwills

here) to seek out the vendor (the Butlers) and offer to fulfill his assignor's obligations under the Uniform Real Estate Contract if he wanted to preserve his interest in that contract. Since the Goodwills did not do this, they have no further interest in the contract. Other state supreme courts have reached similar conclusions.

The requirements of the Fourteenth Amendment's Due Process Clause do not apply in the instant case. They apply only to state action and there was absolutely no state action involved in this case where private parties repossessed their private property from other private parties under the terms of a private contract without invoking the aid or assistance of any state official.

In situations such as the one at bar, not involving racial discrimination, the mere existence of statutes regulating Quiet Title Actions and Mortgage Foreclosures and the provision by the state of a neutral court system to settle private disputes is not sufficient state involvement to constitute state action for Fourteenth Amendment purposes. Numerous courts have so held.

ARGUMENT

Point I

THE GOODWILLS HAVE NO RIGHT TO NOTICE AND A HEARING.

A. Case Law Places the Burden of Notification on the Goodwills.

This case presents a situation wherein the vendors (Butlers, Plaintiffs Dirks' grantors) conveyed their real property to the purchasers (Cornwells) on a Uniform Real Estate Contract, the purchasers failed to comply with paragraphs 15 and 16 of the contract, and the vendors declared a default and elected to repossess the property in accordance with paragraph 16A. Unbeknown to the vendors, prior to the default, the purchasers had executed a trust deed to the property for the purpose of securing a promissory note. The beneficiaries of the trust deed (Goodwills) are the Defendants in the Quiet Title proceeding. Record at 59, 60.

Since there is no genuine issue as to any of the material facts, the Dirks are entitled to have the lower court's order granting them Summary Judgment affirmed if the law as applied to these facts so indicates. Utah Rules of Civil Procedure, Rule 56(c).

This Court has dealt with similar situations in the past. A 1958 case involved a proceeding that closely parallels the one at bar. Jeffs v. Citizens Finance Company, 319 P.2d 858 (Utah 1958). In that instance, a vendor sold the property which was the subject of the quiet title action to a purchaser on a Uniform Title Retaining Real Estate Contract. The purchaser then borrowed a sum of money from the defendant in the action and assigned the contract to the defendant for the purpose of securing the loan. The defendant recorded the assignment but apparently did not inform the vendor of that fact. The vendor

then sold her interest in the property to another party who became the plaintiff in the Quiet Title Action.

This new owner had no actual knowledge of the assignment to the defendant. The purchasers then became delinquent under the terms of the contract and the new owner obtained a default judgment in accordance with the terms of the contract and took possession. When the new owner became aware of the assignment made by the purchaser, he initiated the Quiet Title Action.

In affirming the lower Court's decision to quiet title in the new owner, the Utah Supreme Court stated:

> Under such circumstance [where the assignment was for the purpose of securing a loan], if the lender wishes to protect his loan after his assignor defaults on the real estate contract, it is essential that he [the lendor (the Goodwills in our case)] make a tender of full and unqualified performance with respect to those provisions uncomplied with by the assignor [the Cornwells in our case].

Jeffs v. Citizens Finance Company, Id.

In the instant case, as in Jeffs, the lender (the Goodwills) did not make a tender of full and unqualified performance before the purchasers (the Cornwells) defaulted on their contract obligations, or ever.

The Court went on to state:

> Where no tender of unqualified performance is made, there is no duty on the part of the seller of the real estate to recognize any interest asserted by such assignee, since the seller at least is entitled to performance. . . . In our opinion it is no answer to say that giving notice to the seller, either actual or constructive, places the burden on him to seek out one with whom he had no dealing, and volunteer facts so that an assignee of a real estate contract securing a loan may elect whether to perform the real

> estate contract or not. . . . Requiring diligence on the part of the one holding a real estate contract securing a loan, under a sort of pledge, to seek out and determine the status of his assignor's contractual rights and obligations by way of request, discovery procedure or otherwise, and to require him to make a tender of full performance which his assignor has failed to effectuate does not seem to us to place an unreasonable burden on the lender who desires to protect the consideration for which the contract was assigned or pledged. (Emphasis added).

Id. at 859.

Thus, under the holding of this case, it was up to the Goodwills, the beneficiaries of a trust deed given for the purpose of securing a loan, to seek out the Butlers and to determine the status of the Cornwells' contractual obligations and to make a tender of full performance to the Butlers when the Cornwells defaulted on their contract. This, the Goodwills failed to do, and so cannot be heard now to claim an interest in the real property which secured their loan.

In a 1980 case, the Utah Supreme Court confirmed its adherence to the reasoning and decision it made in the above-cited case. Wiscombe v. The Lockhart Company, 608 P.2d 236 (Utah 1980). This case also is quite similar to the one at bar. The vendor sold some real property by a Uniform Real Estate Contract to the purchaser, the purchaser defaulted on the contract by failing to make an annual payment, and the vendor sent the purchaser a Notice of Default. When the purchaser did not remedy his default, the vendor respossessed the property. Unbeknown to the vendor, the purchaser, prior to his default, had executed and delivered to the lender/assignee a promissory note secured

in part by an assignment of all of his rights, title, and interest in the Uniform Real Estate Contract.

The Court affirmed the lower court's decision quieting title in the vendors as against the assignee. In so doing, it stated:

> Fundamental to the law of assignments is the concept that an assignee takes nothing more by his assignment that his assignor had. . . . Beardall [the purchaser] quit the premises in question on or before February 7, 1977, and so certainly after February 7, the Uniform Real Estate Contract had no further viability of its own. Title to the property remained in Wiscombe [the vendor] no longer subject to the Contract. (Footnote omitted).

Wiscombe v. The Lockhart Company, Id. at 238.

The Court went on to hold that the fact that Lockhart (the lender/assignee) had recorded its assignment from Beardall (the purchaser) on November 5, 1976, did not obligate Wiscombe (the vendor) to recognize Lockhart's interest in the property. The Court stated:

> Lockhart places great emphasis on the fact that its Assignment was recorded and hence gave constructive notice to Wiscombe of the existence of the Assignment citing Jeffs v. Citizen's Finance Co. Lockhart argues there was a duty on the part of Wiscombe to recognize the interest of Lockhart as an assignee of Beardall's interest under the Uniform Real Estate Contract. This reliance by Lockhart on Jeffs is misplaced. In fact, Jeffs supports the decision of the District Court. We there stated: ". . .In our opinion, it is no answer to say that giving notice to the seller, either actual or constructive, places the burden on him to seek out one with whom he had no dealing, and volunteer facts so that the assignee of a real estate contract securing a loan may elect whether to perform the real estate contract or not. Such notice at best would alert the seller to the fact, that upon performance by the purchaser or his assignee, the seller would have a duty to execute a conveyance. Requiring diligence

> on the part of one holding a real estate contract securing the loan, under a sort of pledge, to seek out and determine the status of its assignor's contractual rights and obligations by way of request . . . or otherwise . . . does not seem to us to place an unreasonable burden on the lender who desires to protect the consideration for which the contract was assigned or pledged." (Emphasis in original)

Id.

Applying the reasoning and holding of Wiscombe to the case at bar leads to the conclusion that after Cornwells defaulted on their obligation under the Uniform Real Estate Contract on March 4, 1981, and Butlers repossessed the property in accordance with paragraph 16A of that contract, then Cornwells had no more interest in the property and since Goodwills can have no more interest than the persons they took from, the Cornwells, Goodwills have had no interest in the property that is the subject of the quiet title action since March 4, 1981. The fact that Goodwills recorded their trust deed on April 3, 1980, did not give Butlers notice of Goodwills' interest in the property and did not obligate Butlers to seek the Goodwills out to see if the Goodwills wanted to perform the real estate contract in place of the Cornwells. Therefore, Goodwills' interest in this property was terminated on March 4, 1981, and they have no right, title, or interest in the property at this time. If Goodwills wanted to have an opportunity to perform Cornwells' obligations under the contract to the Butlers, it was up to the Goodwills to seek out the Butlers and offer to perform. It was not the Butlers' responsibility to notify the Goodwills, whose existence they were unaware of, that Cornwells had defaulted.

In their brief, at page 14, the Goodwills attempt to negate the impact of Wiscombe v. The Lockhart Company, Id., on their case by finding a factual difference between it and the case at bar. They state,

> Approximately three weeks after the foreclosure, the mortgagor assigned his interest to the Lockhart Company . . . The present case is factually distinguishable from Wiscombe. More specifically, the Goodwills obtained their security interest before the foreclosure took place. . . .

Goodwills have misread Wiscombe. In Wiscombe, the purchaser (Beardall) assigned his interest in the Uniform Real Estate Contract to Lockhart almost two months before he (Beardall) defaulted and the vendor (Wiscombe) repossessed the property.

> The $15,000 payment due on January 1, 1977, was not received by Wiscombe. By Notice of Default dated January 31, 1977, and served on Beardall on February 2, 1977, Wiscombe gave Beardall five days in which to remedy his default. Beardall did not do so and quit the premises on or before February 7, 1977. Unknown to Wiscombe, Beardall had on November 5, 1976, executed and delivered to Lockhart a promissory note secured in part by an Assignment of Contract whereby Beardall assigned to Lockhart all of his rights, title and interest in and to the Uniform Real Estate Contract of January 1, 1976. Lockhart subsequently recorded the Assignment. (Emphasis added.)

Wiscombe v. The Lockhart Company, Id., at 237.

Thus, it is apparent that in Wiscombe, as in the case at bar, the purchaser assigned his interest in the property to another well before the repossession, or foreclosure as Goodwills call it, took place. The facts in Wiscombe are virtually identical to the facts in this case and Wiscombe mandates that this Court affirm the lower court's Summary Judgment Order in favor of Dirks.

Other state supreme courts have agreed that it is not the responsibility of the vendor to seek out the defaulting purchaser's assignee or mortgagee in order to provide him an opportunity to cure the default. A 1969 case from Washington state involved an action by the representative of the deceased vendor to quiet title to the real property covered by a forfeitable real estate contract and to recover possession of the property. Kendrick v. Davis, 452 P.2d 222 (Wash. 1969). The vendor had sold two parcels of property under a real estate contract to the purchasers, who twice assigned their interest in the property to a finance company. The finance company, the assignee-mortgagee, recorded its interest in the property, and later the purchasers ceased making payments. The vendors then sent a Notice of Declaration of Forfeiture and Cancellation of Contract to the purchasers.

The lower court held for the assignee-mortgagee but the Supreme Court of Washington, sitting en banc, reversed and found for the vendors. In so doing, it stated:

> An instrument may in form be a deed or an assignment, but, if the intent is to use the property as security, it will be a mortgage. . . . The question presented, therefore, is whether the existence of such mortgages will render ineffective the vendor's declaration of forfeiture given to the purchasers alone.

Kendrick v. Davis, Id. at 226.

The Court went on to summarize the case in a manner that makes it apparent that it is very similar to the one at bar. It stated:

> Simply stated, we have this case (1) a valid forfeitable real estate contract property recorded; (2) a purchaser in default; (3) a vendor declaring a forfeiture according to the contract terms; and (4) a mortgagee of the purchaser who is unknown to the vendor, but whose security interest is properly recorded.

Id. at 227.

The Court then stated that the real issue in the case was whether the duty of giving notice was on the vendor or the mortgagee. Id.

The court resolved this issue by holding that:

> The burden is on the mortgagee to notify the vendor of his interest in the contract. No undue burden is thus placed on the mortgagee as he would have actual knowledge both of the identify of the vendor and of the vendor's right to declare a forfeiture of the contract upon the purchaser's default. (Emphasis added.)

Id.

The Court then addressed the issue of whether the recording of the mortgages gave constructive notice of their existence to the vendor. The Court stated:

> But the recording of the mortgages did not give constructive notice of their existence to the vendor who was an antecedent in the chain of title. The recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument. The recording of an instrument does not constitute notice to antecedents in the chain of title. (Emphasis added.)

Id. at 228.

The Court summarized its holding by stating:

> Defendants [the assignee-mortgagee], having failed to give plaintiff [the vendor] notice of their mortgagee interests, were not entitled to receive a notice of the forefeiture. The contract was forfeited in accordance with its terms and there is no purchaser's interest

> remaining in the realty upon which the assignees' (mortgagees') claim can attach.

Id.

Another state supreme court has reached a similar conclusion to the ones reached by the Utah and Washington Supreme Courts. In a recent New Mexico case, a vendor sold a parcel of real property to the purchasers under a real estate contract. Shindledecker v. Savage, 627 P.2d 1241 (N.M. 1981). Later, the purchasers used their interest in the property for the purpose of securing several loans in return for which they gave what was called a "second mortgage" on the property. When the purchasers decided to move from the state, they conveyed the property back to the vendor. There was no evidence that the purchasers were in default on their contract.

The vendor then resold the property and the creditor brought an action to have her "mortgage" declared superior to the claims of others and to have it foreclosed. The Supreme Court of New Mexico declared that the creditor did not have a true second mortgage on a fee interest but only a mortgage on the vendee's (purchaser's) equitable interest. In upholding the lower court's refusal to recognize and foreclose the creditor's mortgage, the court stated:

> By virtue of his mortgage, the mortgagee obtains the original purchaser's right to purchase the property for the consideration stated in the purchase contract. In other words, the mortgagee assumes the rights of the vendee under the real estate contract.

Shindledecker v. Savage, Id. at 1243.

The court then held that even though the mortgagee had the right to assume the purchaser's position under the contract, his rights must yield to the rights of the subsequent purchasers of the property. In explaining this holding, the Court stated:

> The mortgagee of an equitable interest must protect his lien by giving notice to the vendor of his equitable interest so that he can arrange an assumption of the contract in case the vendee defaults or otherwise rescinds the contract. Recording the mortgage does not give the vendor constructive notice such as to require the vendor to notify the mortgagee of his intent to retake the property. (Citation omitted). (Emphasis added)

Id.

Two other courts have held in analagous situations that junior lien holders' rights can be cut off without giving the junior lien holder notice and an opportunity to be heard.

In a case involving the constitutional validity of a section of the Georgia code which allowed the holder of legal title to property that had been given to him as security for payment of a debt to reduce the debt to judgment after default in the payment and then quit claim the legal title back to the debtor and levy upon the land and sell it in satisfaction of the judgment without giving any notice to the debtor or the debtor's grantee, the United States Supreme Court held that the code section was constitutional. In so doing, the court stated:

> The contention that this section is unconstitutional, as applied to such a purchaser [from the grantor-debtor] rests, in the last analysis, upon the claim that he is entitled, as a matter of right, in accordance with settled usage and established principles of law, to notice of a proceeding, to sell the land under the

> prior security deed and opportunity to make defense therein. We cannot sustain this contention.

Scott v. Paisley, 271 U.S. 632, 634 (U.S. 1926). The Court went on to state:

> In the absence of a specific provision to that effect [that the holder of a mortgage or trust deed must give notice to a subsequent purchaser], the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. . . . And it Watkins v. Booth, supra, 94, the court said that it was the duty of the subsequent lienor "to keep advised as to proceeding in case of the former trust deed."

Id. at 635, 636. In a later case, a California court reached a similar conclusion in a suit to have a sale under a deed of trust declared invalid. In refusing to declare the sale invalid, the court stated:

> Appellants' major contention appears to be that since the original trustors were entitled to have notice of sale mailed to them at their address as given in the trust deed, and since the beneficiary had been notified of appellant's acquisition of the property, and of appellants' address, appellant, as successor in interest to the original trustors, was entitled "to specific notice under Section 2924b of the Civil Code." This contention is untenable. . . . So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of the power.

Lancaster Security Investment Corp. v. Kessler, 324 P.2d 634, 636, 638 (Cal. App. 2d 1958).

Goodwills argue at page 10 of their brief that Butlers could have notified the Goodwills of Cornwells' default. While

it may have been possible for the Butlers to learn of the Goodwills' interest in the property, the courts, as the above-cited cases make clear, have held that it was Goodwills' responsibility to seek out Butlers to determine the status of their assignors' (Cornwells') compliance with the terms of the contract.

While the courts could have required the vendors (Butlers) to give notice to the purchasers' assignee (Goodwills), they chose not to do so for a very good, common sense reason. Butlers had no knowledge of the Goodwills' interest in the property and no economic incentive to check with the Weber County Recorders Office to detemine if their defaulting purchasers had assigned their interest to another. For them to have checked with the Recorders Office would have been extraordinary.

Yet for the Goodwills to have checked the status of their assignor's interest in the property upon which they were about to loan $38,ØØØ with the Weber County Recorders Office and so find Butlers' names and address, would have been very ordinary. They had every economic incentive to do so. In fact, it is precisely the kind of behavior one would expect from a reasonable, prudent businessman. Had Goodwills made such a check, they would have discovered not only Butlers' names, address and interest in the property, they would have discovered that their assignors (Cornwells) had previously assigned their interest in the contract to Clearfield State Bank.

B. Goodwills' Argument That Notice By Publication Is Constitutionally Insufficient Is Mere Surplusage.

At page 12 in their brief, Goodwills state:

> The Dirks further argue that the Notice of Foreclosure was published, and that, accordingly, the Goodwills were constructively served with notice. We submit that even notice by publication is constitutionally insufficient.

Dirks never made any such argument. Such an argument would have been inappropriate to make for two reasons. First, as noted above, there was no foreclosure involved in this case. The Butlers repossessed their property in accordance with the provisions of a Uniform Real Estate Contract. Record at 59, 62, 64. Second, the Butlers were unaware of the Goodwills and their interest in the property until well after they had repossessed the property. Record at 60. Goodwills seem to be setting up a straw-man argument in order to knock it down.

The cases cited by Goodwills on pages 14 and 15 of their brief for the proposition that powers of sale in real estate contracts, mortgages and trust deeds have been critically questioned because of the Due Process Clause are so different from the case at bar that they have little value as precedent. It should be noted that none of the cases are from Utah, the Federal District Court for Utah or the Tenth Circuit Court of Appeals. The main issue in Law v. United States Department of Agriculture, 366 F.Supp. 1233 (N.D. Ga. 1973), was the validity of the waiver of plaintiff's due process rights of prior notice. There is no such issue of waiver of the right to notice in the case at bar. Valley Development at Vail v. Warder, City of Eagle, 557 P.2d 1180 (Colo. 1976) involved the validity of a court-held

summary ex parte foreclosure hearing wherein the court limited the subject matter of the hearing to the question of the debtor's military status. There was nothing like a summary ex parte foreclosure hearing involved in the instant case.

Neither do the other two cases cited by Goodwills in this section bear a close factual relationship to the case at bar. In Ricker v. United States, 417 F.Supp. 133 (D. Me. 1976) government action was involved because a federal employee initiated and carried out a foreclosure sale of the mortgagor's farm. In our case, there was absolutely no state or government action involved in Butlers' repossession of the property under the terms of their Uniform Real Estate Contract. Finally, in Federal National Mortgage Association v. Beard, 659 P.2d 232 (Kan. Ct. App. 1983), where a mortgage was being foreclosed and an attempt at personal service on the defendant was unsuccessful, the critical consideration was the distinction between knowledge of the defendants' mailing address, which the plaintiff had, and knowledge of the defendants' residence, which the plaintiff did not have. Obviously, the case at bar bears little resemblance to Beard since it involves a repossession under a Uniform Real Estate Contract, not a foreclosure proceeding, and the Butlers had no knowledge of either Goodwills' residence or mailing address when the repossession took place. Record at 59, 60.

It is apparent from the applicable case law that this Court should affirm the lower court's order granting Summary Judgment to the Plaintiffs-Respondents. There are two Utah

cases, Jeffs. v. Citizens Finance Company, supra, and Wiscombe v. The Lockhart Company, supra, the facts of which are virtually the same as the facts in the instant case, wherein this Court has determined that it is up to the purchaser's assignee (the Goodwills) of a real estate contract to seek out and notify the vendor (the Butlers) and determine their assignors' rights and obligations so that the assignee can arrange to assume the contract in the event the purchaser defaults in his obligations under the real estate contract. Other state supreme courts have reached the same conclusion. This the Goodwills did not do. These courts also argue that the recording of the assignee's interest in the property does not give constructive notice to the vendor of the subsequent interest in the property. The United States Supreme Court in Scott v. Paisley, supra, and a California appeals court in Lancaster Security Investment Corp. v. Kessler, supra, have held in analagous situations that junior lien holders' rights can be cut off without notice. Goodwills have cited no cases similar to the one at bar which have held that it was Butlers' duty to seek out Goodwills, who they did not know and had no reason to know, and give them notice of their assignors' default.

POINT II

UTAH'S FORECLOSURE AND QUIET TITLE PROCEDURES DO NOT CONSTITUTE STATE ACTION FOR FOURTEENTH AMENDMENT DUE PROCESS PURPOSES.

A. The Fourteenth Amendment Applies To State Action, Not To Private Action.

The Defendants' contention that the 14th Amendment's Due Process clause requires that they be given notice of Butlers' intention to repossess the property after Cornwells defaulted has no basis. The first section of the Fourteenth Amendment to the United States Constitution states:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

Thus, from a plain reading of this portion of the Fourteenth Amendment, it is apparent that it is the state which is prohibited from depriving persons of property without due process of law. The United States Supreme Court and numerous other federal and state courts have so held. Shelley v. Kraemer, 334 U.S. 1 (U.S. 1948); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (U.S. 1974); Warren v. Government National Mortgage Association, 611 F.2d 1229 (8th Cir. 198Ø); Neidner v. Salt River Project Agricultural and Power District, 59Ø P.2d 447 (Ariz. 1979); Allied Sheet Metal Fabricators v. Peoples National Bank, 518 P.2d 734 (Wash. Ct. App. 1974).

These cases make clear that it is a firmly established principle of our judicial system that the Due Process Clause of the Fourteenth Amendment can only be invoked when a state takes action to deprive a person of life, liberty, or property without due process of law. The Defendants acknowledged this fact in their brief at pages 4 and 5.

B. There Was Absolutely No State Action Involved In The Case At Bar.

The courts have provided us with guidelines to help us determine how closely involved a state must be with an event before state involvement becomes "state action" for Fourteenth Amendment purposes. The First Circuit Court of Appeals stated in a recent case:

> In short, the party seeking to establish that action of a private party violated the Constitution must be able to point to the specific act or actions of the government which in fact motivated the private action.

Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 450 (1st Cir. 1983). In an earlier case, the United States Supreme Court found that it was not possible to generalize about when private action constituted state action. It stated:

> Owing to the very "largeness" of the government, a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 725-726 (U.S. 1961).

What "specific acts or actions of the government", Gerena, supra, "in the framework of the peculiar facts or circumstances," Burton, Id., of the case at bar have Goodwills pointed to which motivated Butlers to repossess the property without informing the Goodwills? None.

There was absolutely no state action involved. Here the Butlers, the plaintiffs' grantors, entered and repossessed

the property in question after the Cornwells, the defendants' assignors, defaulted. They did so in accordance with the provisions of a private contract, a Uniform Real Estate Contract. There were no state officials involved nor was it done under the provisions of any particular state statute. It was a private action carried out between private citizens under the terms of a private contract. Since there was absolutely no state action involved in the repossession of the property, the defendants cannot call upon the Fourteenth Amendment's Due Process Clause to support their claim that they were entitled to notice and a hearing before the Butlers repossessed the property.

As a federal district court stated in a 1979 case involving the distraint of property under the terms of a commercial lease:

> This is a commercial lease and nowhere is unconscionability or inequality of bargaining power alleged. Consequently, the parties are bound by the clear contract language which allowed the landlord the right to distraint for unpaid rent. A remedy devised by private parties and executed without the help of public officials does not constitute state action. It is "well settled that the fourteenth amendment applies only to actions of the 'state' and not to actions which are 'private'." (Emphasis added.)

SMI Industries, Inc. v. Lanard & Axilbund, Inc., 481 F.Supp. 459, 461-462 (E.D. Pa 1979) quoting Gibbs v. Titelman, 502 F.2d 1107, 1110 (3rd Cir. 1974), cert. denied, 419 U.S. 1039, 95 S.Ct. 526, 42 L.Ed.2d 316.

C. The Use Of The Courts To Enforce Private Agreements Not Involving Racial Discrimination Is Not State Action For Fourteenth Amendment Purposes.

The Goodwills claim at page 6 in their brief that the use of the courts as "the final step of quieting title" is sufficient state involvement to constitute state action for Fourteenth Amendment purposes and so to extend the Due Process requirements to the private agreement between Butlers and Cornwells. Their main support for this proposition is the United States Supreme Court decision in Shelley v. Kraemer, 334 U.S. 1 (U.S. 1948).

While a superficial reading of Shelley v. Kraemer may lead one to believe that the Supreme Court held that any use of the courts to enforce a private agreement brought that agreement within the restrictions of the Fourteenth Amendment, a more careful analysis of the case reveals that the Court's holding was much more limited than that and, in fact, does not bring the judicial enforcement of a private agreement such as the one at bar, within the purview of the Fourteenth Amendment. It must be noted that in Shelley v. Kraemer, the private agreement in question was a restrictive covenant that prohibited the use of the property involved to any person not of the Caucasian race. This covenant was broken by private parties.

> On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.

Id. at 5.

It was another owner of property subject to the covenants who brought the suit to have the covenants enforced by restraining Shelleys from taking possession of the property and by divesting them of title to the property. The trial court denied the requested

relief on the ground that the restrictive agreement had never become effective because it had not been signed, as intended, by all property owners in the district. It was in this posture that the case went to the Supreme Court of Missouri, i.e., with the Negroes Shelley holding title to the property and occupying it under the terms of a private sale.

> The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the [restrictive covenant] agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

Id. at 6.

It is apparent, then, that without the positive action of the Missouri Supreme Court, the Negroes Shelley would have had title to, and possession of, the property despite the restrictive covenants. It was this positive action by the Missouri Supreme Court to which the United States Supreme Court particularly objected. It stated:

> We have no doubt that there has been state action in these cases [a second case with similar facts was decided at the same time] in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. (Emphasis added)

Id. at 19.

Besides this positive impact of the state court's action on the status quo, another reason that the Supreme Court in Shelley v. Kraemer found state action for Fourteenth Amendment purposes was the fact that the case involved racial discrimination, the prevention of which was the precise reason for the adoption of the Fourteenth Amendment. Several federal courts have acknowledged the fact that when racial discrimination is present in a case, it takes less state involvement to constitute state action and so invokes the strictures of the Fourteenth Amendment.

In a 1974 case involving an action brought under the Civil Rights Act and the Fourteenth Amendment, a car buyer alleged that state action was present when the car dealer resorted to self-help repossession which was permitted in the contract between the parties. The Sixth Circuit Court of Appeals upheld the United States District Court's dismissal of the suit. In so doing, the court stated:

> We are likewise pursuaded that Reitman [Reitman v. Mulkey, 387 U.S. 369 (U.S. 1967), which invalidated a California constitutional provision that permitted racial discrimination in housing] cannot be relied upon to justify a finding of state action here. Our opinion in Palmer notwithstanding, 479 F.2d 153 (6th Cir. 1973), we view Reitman as dealing with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny. The injustices of racial discrimination cast a different shadow than that of the case before us. (Citation omitted) (Emphasis added).

Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974).

The United States District Court for Nebraska expressed a similar sentiment in an earlier case which involved the question

of whether self-help repossession of an automobile under the terms of the Nebraska Commercial Code constituted state action so as to allow the plaintiff to invoke the Due Process Clause of the Fourteenth Amendment. In dismissing the action for lack of jurisdiction, the court stated:

> It must also be remembered that such cases as Reitman grew out of the pervasive evil of racial discrimination, which demands peculiarly stringent procedures for eradication. No racial considerations infest the present case. (Emphasis added).

Pease v. Havelock, 351 F.Supp. 118, 121 (D. Neb. 1972).

In another case which involved the question of whether or not state action was involved in a private university's denial of employment to two women, the Second Circuit Court of Appeals recognized the fact that a lesser amount of state involvement is needed to find state action in racial discrimination cases than in non-racial discrimination cases. It stated:

> Moreover we have recognized the existence of a "double standard" in state action--"one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims," Jackson v. The Statler Foundation, 496 F.2d 623, 629 (2d. Cir. 1974). . . ;

Weise v. Syracuse University, 522 F.2d 397, 405 (2d. Cir. 1975).

At least two courts have refused to find that a court's acting in its judicial capacity as an impartial arbiter to settle disputes constituted state action for Fourteenth Amendment purposes. In a 1975 case, the Supreme Court of Missouri was called upon to determine if a lower court's upholding of the validity of a trust which included provisions that the income from the trust be used to support Protestant Hospitals for the support and

care of sick and infirm white patients was constitutional. In upholding the validity of the trust despite the racial and religious overtones, the Court refused to categorize the lower court's participation in the case as state action for Fourteenth Amendment purposes. The court stated:

> Under the facts of this case, "state action" was not involved in the creation of the trust, nor is it required to carry out its terms. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion. . . .
>
> Nor has the court in construing this trust engaged in "sponsoring," "promoting," or "enforcing" discrimination, as in Shelley v. Kraemer, supra, and Barrows v. Jackson, supra, where the court was asked to rule [sic] the legality of a restrictive covenant prohibiting real estate sales to blacks, and to implement the holding by affirmative judicial action such as ouster from possession of the black owner or granting a money judgment and execution. . . .
>
> If appellants' arguments were sustained, then no transfer of property by will to a religious institution or to a person of a designated race could be valid if a construction of the will's provisions became necessary. Such is not an indicated result under the law. (Emphasis added).

First National Bank of Kansas City v. Danforth, 523 S.W.2d 808, 821 (Mo. 1975), reh'g or transfer to court en banc denied, cert. denied 95 S. Ct. 1999, 2424 (1975).

The Second Circuit Court of Appeals reached a similar determination in a case involving a complaint by a tenant alleging her eviction from an apartment building which had received federal benefits in the form of mortgage insurance under the National Housing Act was without due process procedures. The court failed to find any state action involved and stated:

> Neither, despite some language in Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L.Ed. 1161 (1948) can state action be found in New York providing defendant with the same right to secure eviction of a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching.

McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2nd Cir. 1970).

Since there is no racial discrimination involved in the case at bar and the lower court was not asked to take any positive action to enforce discrimination, the two preconditions for finding state action due to the court's involvement are not present as they were in Shelley v. Kraemer, supra. Therefore, this Court must find that merely using the state court system as a neutral arbiter to settle disputes among private parties does not constitute state action for Fourteenth Amendment purposes.

If the use of the courts to settle disputes over private real estate contracts or foreclosure proceedings were found to be state action, then the distinction between state action and private action as set forth over 100 years ago, and by which the judiciary has been guided since then, would be obliterated.

> Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrong.

Shelley v. Kraemer, supra, at 13.

D. The Existence Of State Statutes Which Regulate The Enforcement Of Private Agreements Does Not Constitute State Action For Fourteenth Amendment Purposes.

Goodwills contend on page 6 of their brief that state action is present in the case at bar becuase the state has provided "facilities, services and extensive regulation which assist in foreclosure of a private agreement." As support for this contention, they offer four court decisions plus the fact of the existence of several Utah Code sections dealing with real property.

This Court must reject this contention for several reasons. First of all, as noted above, there has been no foreclosure proceeding involved in this case. The Butlers, as private parties, merely repossessed their property from other private parties under the terms of a private agreement. There was no involvement of a sheriff or a court clerk or any other state official, nor was there reliance on any statute. The only involvement of the state at all was through its provision of a court system which has been called upon to act as a neutral arbitor to settle this dispute. The reasons why the involvement of the courts in this fashion does not constitute state action for Fourteenth Amendment purposes was discussed in the preceeding section.

Second, even if the existence of foreclosure statutes is considered applicable to the instant case by analogy, when analyzed carefully, the four cases relied on by Goodwills do not support the proposition that the state involvement in the case at bar is sufficient to constitute state action for Fourteenth Amendment purposes. The first case relied upon here by the Goodwills is Burton v. Wilmington Parking Authority, 365 U.S. 715

(U.S. 1961). It was an action by a black for declaratory and injunctive relief against a restaurant located within an off-street parking building owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware. The restaurant, the lessee of the Wilmington Parking Authority, refused to serve the black food or drink solely because of his race.

A main issue in the case was whether the restaurant's refusal of service to the black was private action and so beyond the reach of the Fourteenth Amendment or state action and so subject to the Amendment. In finding that it was state action, the Court outlined the extensive state involvement with the restaurant. It stated,

> The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code, Sections 501, 514. The cost of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. . . . [T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral, and, indeed, indespensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. . . . Addition of all of these activities and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates the degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. (Emphasis added.)

Id. at 723-724.

In contrast to the extensive state involvement which the Court found existed in Burton, in the case at bar, there was no state involvement. The Butlers acted as private parties to repossess their property from other private parties under the terms of a private agreement without the assistance or involvement of any state officials. Therefore, the finding of state involvement for Fourteenth Amendment purposes by the Court in Burton does not dictate a similar finding by this Court in the instant case. In fact, the Court in Burton went out of the way to limit the impact of its holding. It stated:

> Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

Id. at 726.

It should also be noted that Burton was a case involving racial discrimination whereas in the instant case there is no such discrimination involved. In the previously cited case of Weise v. Syracuse University, the Second Circuit Court of Appeals found this difference significant. It stated:

> As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to subject the issue to judicial scrutiny. This explains the willingness to find state action in racial discrimination cases although the same state-private relationship might not trigger such a finding in a case involving a different dispute over a different interest.

Supra, at 406.

The Goodwills next rely on the case of Reitman v. Mulkey, 387 U.S. 369 (U.S. 1967), for the proposition that the existence of statutes providing for Quiet Title Actions and for extensive property regulation amounts to state encouragement of the use of these statutes which constitutes state action for Fourteenth Amendment purposes.

Upon close analysis, it is apparent that the findings in Reitman are not applicable to the case at bar. That case involved two actions wherein two couples sued apartment owners for racial discrimination, in one case for refusing to rent an apartment and in the other one for eviction. These actions required an interpretation of the constitutionality of a recent California initiative which amended the state constitution to prohibit the state from interfering in an owner's decision to sell, lease or rent his property to anyone he chose. The California Supreme Court found that this provision violated the Equal Protection Clause of the Fourteenth Amendment because it allowed racial discrimination.

In affirming the California Supreme Court's decision, the United States Supreme Court stated:

> [T]he State has taken affirmative action designed to make private discrimination legally possible. Section 26 [the amended section] was said [by the California Supreme Court] to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decisions"; Section 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination". . . . Here we are dealing with a provision which does not just repeal an existing law forbidding racial discrimination. Section 26

> was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State.

Supra, at 375, 380-381.

It seems apparent that the existence of statutes authorizing Quiet Title Actions and regulating property is not positive state encouragement for private parties to repossess their property without providing notice in the same sense that the passage of the constitutional amendment forbidding state interference with the decisions of owners of property to decline to sell, lease or rent to any person was positive state encouragement for private racial discrimination.

Therefore, the fact that the Supreme Court found state action in Reitman does not mandate that this Court find state action in the instant case. This is especially true when it is noted that Reitman involved racial discrimination, the very reason for the existence of the Fourteenth Amendment.

Several federal courts have refused to apply Reitman to cases that did not involve racial discrimination. In a case which involved an automobile dealer's attempted repossession of a used car by self-help methods under a state statute, the Fifth Circuit Court of Appeals found that the existence of the statute did not involve sufficient state action to confer federal jurisdiction under the Civil Rights Act. In so holding, the court stated:

> The outer boundaries of "imputed" state actions have been charted primarily in race discrimination cases. We are unwilling to push out the frontier still farther

> in a case devoid of racial overtones. The same consideration compels us to reject appellee's argument based on Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1966). There again racial discrimination was involved. Moreover, the indicia of state involvement were much stronger, because, as the opinion made clear, the purpose of the challenged state constitutional amendment was to authorize private discrimination in the transfer of real property where before it had been barred by statute.

James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974).

In a class action suit filed under the Civil Rights Act, the plaintiffs based their complaint on the claim that self-help repossession of automobiles subject to security interests were invalid. The federal district court found certain provisions of the state motor vehicle code invalid, but the Third Circuit Court of Appeals reversed because it found no state action and, therefore, no cause of action had been alleged under the Civil Rights Statute. In so doing, it stated:

> Nor do we find in the statutory scheme the kind of encouragement and fosterage of the alleged unconstitutional act as in Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). In Reitman, the State constitutional amendment repealed prior state legislation regulating racial discrimination in housing. Thus, in effect, the state constitutionally authorized discrimination by repealing prior law and by substantially inhibiting any subsequent change. The case before us is vastly dissimilar to the situation in Reitman.

Gibbs v. Titelman, 502 F.2d 1107, 1111 (3rd Cir. 1974).

Based upon the authority of the above-cited cases, this Court should refuse to extend the rationale of Reitman to the case at bar which does not involve racial discrimination.

Goodwills next cite Northrip v. Federal National Mortgage Association, 372 F.Supp. 594 (E.D. Mich. 1974) as support for their contention that the existence of state statutes allowing

Quiet Title Actions and regulating property is state encouragement of repossession procedures followed by Butlers and so is state action for Fourteenth Amendment purposes. This case involved the contention that the existence of statutes regulating the foreclosure of mortgages by advertisement was sufficient state encouragement of the procedure so as to constitute state action for Fourteenth Amendment purposes.

Goodwills' reliance on this case is misplaced because, although the federal district court found state action, the decision was reversed on appeal by the Sixth Circuit Court of Appeals. In reversing, the court stated:

> The district court held the foreclosure proceeding violative of the Fourteenth Amendment of the United States Constitution and Article I Section 17 of the Michigan Constitution of 1963. Because we find no significant state involvement in the foreclosure proceeding assailed here, we reverse the judgment of the district court. . . .
>
> This case differs materially from Reitman. Judge Peck, writing for the court in Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974), said that Reitman "deal[t] with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny". 503 F.2d at 611. In Turner and in Gary v. Darnell, 505 F.2d 741 (6th Cir. 1974), we upheld the Tennessee and Kentucky legislatures' implementation of Section 9-503 of the Uniform Commercial Code, which authorizes a secured creditor to peacefully repossess collateral.
>
> In this case, as in Turner and Gary, we are not concerned with questions of racial discrimination or state use of indirect means to accomplish illegal ends. Like Turner and Gary, this case concerns a remedy privately created by contract. . . .
>
> What Judge Peck said in Turner applies as well here: It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded

by the simply permissive statute. . . .

> We fail to see where the creditor has sought to invoke any state machinery to its aid. Rather the creditor has simply relied upon the terms of its security agreement pursuant to the private right of contract. . . . We fail to see how the creditor is attempting to enforce any right in reliance upon a constitutional or statutory provision as in Reitman or is even asserting any state-created right. Rather we see a creditor privately effectuating a right which was created in advance by contract between the parties. (Emphasis added)

Northrip v. Federal National Mortgage Association, 527 F.2d 23, 24, 26-28 (6th Cir. 1975).

In the case at bar just as in the above cited case, the Butlers were not relying on any statutory provision but were "privately effectuating a right which was created in advance by contract between the parties," Id., when they repossessed their property from the Cornwells. Therefore, this Court must likewise find there was no state action for Fourteenth Amendment purposes involved in the instant case.

Finally, Goodwills rely on Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (U.S. 1982), as support for their contention that state action exists in the case at bar. Lugar involved a situation wherein a supplier of the lessee-operator of a truck stop sued in state court for the debt owed it. Ancillary to that action and pursuant to state law, the supplier sought prejudgment attachment of some of the operator's property.

Although the United States Supreme Court found state action in Lugar, the holding seems narrowly drawn. The Court stated:

> The prejudgment attachment procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose

> of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. (Emphasis added).

Id. at 924. The court went on to state:

> Whatever may be true in other contexts, this is sufficient [invoking the aid of state officials] when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute (Emphasis added.)

Id. at 942.

It seems clear from the underlined language that the Court based its decision in Lugar not upon the existence of a statutory scheme which regulated property and provided for court settlement of private disputes, but upon the existence of a statutory scheme whereby state officials, a court clerk and a county sheriff, attached property upon the ex parte application of one party to a private dispute. Since in the case at bar there was no ex parte application and no court clerk, county sheriff or any other state official involved in Butler's private repossession of their property from the other private parties under the terms of a private contract, Lugar does not mandate the finding that the existence of state statutes allowing Quiet Title Actions and providing for the regulation of property is state action for Fourteenth Amendment purposes.

Three separate state supreme courts have refused to find state action in situations analagous to the instant case. In a 1975 case involving a foreclosure proceeding under a power of sale, the complaint attacked the constitutionality of various sections of state statutes because they failed to provide for adequate notice and opportunity to be heard. The Supreme Court

of Georgia rejected these attacks, stating:

> The power of sale may not be utilized except under the provisions of a contract and if exercised the statute provides the manner in which such power is to be exercised. It is a purely contractual matter between two parties in the exercise of private property rights. There is insufficient meaningful government involvement to constitute state action by the mere adoption of statutes providing for the sale of real estate under powers contained in mortgages, debts, deeds or other lien contracts where the grant of such power is contained in the contract between the parties thereto. No government official or agency is involved in such process. (Emphasis added).

Coffey Enterprises Realty and Development Company, Inc. v. Holmes, 213 S.E.2d 882, 884 (Ga. 1975).

The Supreme Court of Missouri sitting en banc also refused to find state action in a case that involved the foreclosure of a deed of trust pursuant to a power of sale. In so doing, the Court stated:

> In Federal National Mortgage Association v. Howlett, 521 S.W.2d 428 (Mo. Banc 1975) this court was presented with the issue of whether the statutory provisions relating to the foreclosure of deeds of trust under a power of sale are unconstitutional on the basis that they violate the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. The same basic issue is presented again in this case. . . .
>
> We also held in Howlett that the fact that the statutory provisions relating to extrajudicial foreclosure recognize and authorize, and thus possibly encourage, use of the procedure authorized by contract, or the fact that a purchaser at such a foreclosure sale may use the state courts to enforce rights to possession thereby acquired, does not render the foreclosure proceedings such significant "state action" as is required to make the Fourteenth Amendment due process clause applicable.
>
> The Fourteenth Amendment questions presented in this case are essentially the same as those presented in Howlett. The holding in Howlett that extrajudicial foreclosure which has been authorized by agreement expressed in the security instrument does not involve

> significant state action, notwithstanding applicable statutory provisions, supplies the answers to all of defendants' Fourteenth Amendment due process questions. The foreclosure of the deed of trust on defendants' property was pursuant to a power expressly granted by that instrument and not to any power authorized or encouraged by state law. (Emphasis added).

Federal National Mortgage Association v. Scott, 548 S.W.2d 545, 548-549 (Mo. 1977).

Finally, the Michigan Supreme Court also refused to find state action in a case wherein the mortgagor's debt was accelerated and his property sold by the mortgagee under the terms of their contract. The Court stated:

> The essence of plaintiff's constitutional argument is that the foreclosure statute grants a mortgagee the power to terminate a mortgage relationship by use of procedures that are not in harmony with the requirements of the Fourteenth Amendment to the United States Constitution and Article I Section 17 of the Michigan Constitution. Specifically, she claims that the Mighican foreclosure by advertisement statute, as applied, violated the due process clauses of the two constitutions in that it requires neither a notice of hearing, nor a hearing to establish the debt. . . .
>
> Since the power of sale is an incident of the private right to contract, [citation omitted], a mortgagee who exercises a foreclosure option is relying on a contract remedy, and not on a right created by statute. [Sic] 527 F.2d 26-27. Therefore, the state cannot be said to be significantly involved, through "encouragement," in the challenged conduct, and a due process question is consequently not presented. . . .
>
> Accordingly, we hold that the plaintiff's instant claim of unconstitutionality under both the Michigan and Federal Constitution fails for lack of the existence of state action.

Cramer v. Metropolitan Savings and Loan Association, 258 N.W.2d 20, 22-23 (Mich. 1977).

In a previously cited case involving a car buyer who brought an action against a car dealer for resorting to self-help

repossession as permitted in the contract between the parties and as allowed by state statute, the Sixth Circuit Court of Appeals refused to find state action. In so doing, it stated:

> This case presents the issue as to whether peaceful repossession under the Tennessee statute is action under the color of state law within the meaning of 42 U.S.C. Section 1983 and state action within the meaning of the due process clause of the Fourteenth Amendment. . . .
>
> It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded by the simply permissive statute. . . .
>
> We fail to see where the creditor has sought to invoke any state machinery to its aid. Rather, the creditor has simply relied upon the terms of its security agreement pursuant to the private right of contract. (Emphasis added).

Turner v. Impala Motors, supra, at 608, 611.

In a later case involving a nursing home resident receiving federal assistance under the medicaid program who was threatened with eviction, a federal district court refused to find state action. It stated:

> Moreover, the cases also indicate that even the combination of limited public funding and State regulation does not transmute private action into state action. . . . At most the State, by failing to require a hearing prior to eviction has acquiesced in the private entity's conduct. The Supreme Court, however, "has never held that a State's mere acquiescence in a private action converts that action into that of the State." (Empasis added).

Wagner v. Sheltz, 471 F.Supp. 903, 908 (D. Conn. 1979) quoting Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (U.S. 1978).

Thus, it seems clear from the authorities cited that this Court must find that the mere provision by the State of Utah of facilities, services and statutes which assist in

the foreclosure of private agreements does not constitute state action for Fourteenth Amendment purposes. The Court should so find both because each of the four cases relied on by the Goodwills to support this proposition has been shown to be inapplicable to the case at bar and numerous other authorities have been cited which have held in analagous situations that the provision of similar facilities, services and statutes by the state is insufficient state involvement in a right created by a private agreement to constitute state action for Fourteenth Amendment purposes.

If this Court were to find otherwise, that distinction articulated in The Civil Rights Cases, 109 U.S. 3 (U.S. 1883), between state action which is subject to the prohibitions of the Fourteenth Amendment and private action which is not would be blurred beyond recognition. Several courts have articulated their concern that under such a holding virtually all private action would become state action:

> Virtually all formal private arrangements assume, at some point, the supportive role of the state. To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase to a significant extent the constitutional line between private and state action and subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect.

Garfinkle v. Superior Court of Contra Costa County, 578 P.2d 925, 932 (Cal. 1978), quoting Berrera v. Security Building and Investment Corporation, 519 F.2d 1166, 1170 (5th Cir. 1975).

> The Court finds little significance in the fact that a clerk may perform the ministerial act of recording

> the deed under power evidencing sale or that the courts of the State of Georgia may enforce the agreements the parties have made. Were these factors considered determinative, every private agreement between citizens would be imbued with state action.

Global Industries, Inc. v. Harris, 376 F.Supp. 1379, 1383 (N.D. Ga. 1974).

> Similarly, if it is to be said that any act by an individual is state action if the state's law permits it, almost every act by an individual becomes state action. Such long-settled rights of private property as possessory liens of every type would be subject to being swept away, because of the inability to give notice and to hold a hearing prior to the holding of possession.

Pease v. Havelock National Bank, supra, at 121.

> At least an aspect of appellees' argument, distilled to its essense, is that when a state attempts to comprehensively regulate on area of private conduct, its failure to prohibit is equivalent to "state action." Such a rule, however, would virtually obliterate the distinction between state and private action. As the Ninth Circuit noted in Adams v. Southern California First National Bank, 492 F.2d 324, 330-331 (9th Cir. 1973): "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept. . . . If we were to accept the debtors' broad test, it would be very difficult to draw any line between state and private action." (Emphasis added.)

Gibbs v. Titelman, supra, at 1112.

This Court, too, must refuse "to obliterate the distinction between state and private action" in the instant case.

CONCLUSION

In the case at bar, the Plaintiffs-Respondents' grantors, private parties, repossessed their property under the terms of their private contract with other private parties and without

the assistance of any state officials and without relying on any state statute. The Defendants-Appellants contend that this action violated their Fourteenth Amendment due process right to notice and a hearing because somehow state action was involved.

This Court must reject Defendants-Appellants' argument and affirm the lower court's order granting Summary Judgment to the Plaintiffs-Respondents for several reasons. First, to do so would follow the precedent set by this Court and other state supreme courts in cases involving very similar fact patterns.

Second, the United States Supreme Court and a California court have held in an analagous situation that junior lien holder's rights can be cut off without notice.

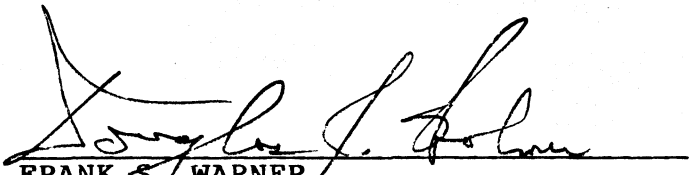
Third, the Fourteenth Amendment is not applicable to the case at bar because there was absolutely no state action involved in Butlers' repossession of their property under the terms of their private contract. Virtually all of the cases cited by Defendants-Appellants Goodwills as support for their contention involved racial discrimination, a particular concern of the Fourteenth Amendment and one which requires lesser state involvement for a finding of state action than do cases such as the one at bar where no racial discrimination is involved.

Fourth, numerous authorities have held that the mere existence of state statutes and the availability of courts as neutral arbitors to settle disputes do not constitute such state involvement in private disputes as to constitute state action for Fourteenth Amendment purposes.

Finally, if the Court were to find that state action is present in the case at bar, that distinction articulated by the United States Supreme Court over 100 years ago between private action and state action would be hopelessly blurred, leading to more and more involvement of the government into the private contracts and lives of individual citizens.

Therefore, it is respectfully requested that this Court affirm the order of the Second Judicial District Court granting Summary Judgment to the Plaintiffs-Respondents.

RESPECTFULLY SUBMITTED this 21st day of February, 1985.



FRANK S. WARNER
DOUGLAS J. HOLMES
Attorneys for Plaintiffs
Darwin Dirks and Jacquelyn Dirks

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of February, 1985, I deposited for mailing in the U.S. Mail, postage prepaid, four true and correct copies of the foregoing to **EARL S. SPAFFORD** and **LYNN C. SPAFFORD**, Spafford, Dibb, Duffin and Jensen, attorneys for Defendants-Appellants Wilford W. Goodwill and Dorothy P. Goodwill at 311 South State Street, Suite 380, Salt Lake City, Utah 84111.

DOUGLAS J. HOLMES

"THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD SEEK OTHER COMPETENT ADVICE."

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 15th day of May, A. D., 19 78, by and between Alma S. Butler and Wanda R. Butler, husband and wife hereinafter designated as the Seller, and Paul S. Cornwell and Catherine L. Cornwell, husband & wife as joint tenants with full right of survivorship and not as tenants in common, hereinafter designated as the Buyer, of _____

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Weber, State of Utah, to-wit: _____ ADDRESS

More particularly described as follows:

Lot 21, Block 3, Herefordshire Subdivision No. 2, "Planned Residential Development", Roy City, Weber County, Utah.

Cancelled -

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Seventy-one Thousand and No/100 - - - - - - - - - - - - - - - Dollars ($ 71,000.00) payable at the office of Seller, his assigns or order _____ strictly within the following times, to-wit: Eight Thousand and No/100 - - - - - - ($ 8,000.00) cash, the receipt of which is hereby acknowledged, and the balance of $ 63,000.00 shall be paid as follows:

In monthly installments of $506.92 each month commencing July 1, 1978 and continuing monthly thereafter until the principal and the interest are paid in full. In addition to this monthly figure, there will be an additional $5,000 balloon payment due Nov. 15, 1979. The buyer herein will also deposit with Citizens National Bank $55.00 a month to cover taxes and insurance which will be paid to sellers to reimburse them for taxes and insurance premiums. . . . If this sum becomes insufficient, the amount will increase according to the amounts due on tax & insurance.

The Buyer agrees to pay a 5% late charge for any payment made 15 days after due.

Possession of said premises shall be delivered to buyer on the 15th day of May, 19 78.

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from May 15, 1978 on all unpaid portions of the purchase price at the rate of nine one-quarter per cent (9 1/4 %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of Ogden First Federal Savings and Loan Association with an unpaid balance of $ 43,503.64, as of April 1, 1978.

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following none.

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed nine three quarter perc... (9 3/4%) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

[redacted]

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

none

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

12. The Buyer agrees to pay the general taxes after May 15, 1978

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or $_____ and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of ¾ of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 20 days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within 10 days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgement for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default): or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgement for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such a time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto _____

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

_____

Elma A Butler

Seller

Buyer

Uniform Real Estate Contract

To

No.